Adams, John, 57
affiliated argument, 32
instituted discourse and, 37
judges and, 37
arbitrariness, 5, 54–55, 77, 128
anomic, 74–75, 164
judgment and, 73–74
nomothetic, 75–77, 141, 164
rationality and, 3
types of, 73
argument, 10, 12, 16, 31–32, 115, 116–117, 162. See also affiliated argument; formalized law; idealized law
botched, 38
canons of proper, 10, 18–19, 25, 35, 89
cohesion and, 25, 113–114, 124, 167
in context of standing laws, 79
fear of failure of, 120
formal, 48–49, 81, 121, 143, 151
forum for liberal legal argument, 17
ideal, 107, 109, 121–122
as instituted discourse, 25–26, 29
law-like argument, 35, 38, 55, 80, 97–98
modes of, 48, 50–51, 115, 119, 120
nomological conception and, 34, 51
nonformal, 49, 50, 82
practice of, 7, 29–30
rational realm of, 41
starting point of, 62
zones of, 33–35, 35, 57
articulate consistency, 113
aspiration, 4, 9–10, 12, 16, 44, 53. See also nomological commitment
to achieve legality, 39
biform, 163–166
duality from liberal, 88
formative aspiration of legal practice, 15–17, 165

Bohannan, Paul, 28
Brandeis, Louis, 110
cautery assumptions, 9
classification, 81, 121, 143
of language, arbitrariness of, 128
of the world, 156
coercive regularity, 70–71
cohesion, 1, 8, 89, 99, 105
cohesion-seeking argument, 25, 113–114, 124, 167
formal law without, 94
formalized law and, 85–86, 96
idealized law and, 85–86
imperative of, 63–64, 86
nomological rationality and, 64, 98–99
Rawls on, 93
Weber on, 93
collective authority, xii, 15, 58
common concepts, 146
common language, 121, 146, 156, 160
domain of discussion in, 146–147
formal law and, 151
legality and, 144
openness of, 144–146, 166
vagueness of, 123–124, 126, 143, 144–146
persistence of, 147
common law, 112–113, 114, 156
common reason, 58
communicative activity, 145
general communication, 146–147
compartmentalization of law, 114
textual judgment, 5
contract law, 52–51
control
of life, by law, 1
of reason in law, xi
courts, 31, 55
lawyers in, 36

171
courts (cont.)
in Nazi Germany, 47
critical legal studies, 48, 127
A Critique of Adjudication (Kennedy), 127
Dalton, Clare, 149
deconstruction, 129, 149
deep duality, 86–87, 89–90, 105
democracy, 118
democratic self-government, 159
derivation, 6
Derrida, Jacques, 129, 149
differentiated law, 28
dignity, 113, 126
discursive canons, 34
disorder, 123, 126, 155
extramural, 154, 160
implications of, 159
two ideas of, 153, 156
domination, 72
duality, 77, 88. See also deep duality
argument and, 88
Dworkin on, 95–96
Hart on, 107–108
liberal law pattern of, 166
due process, 113
Dworkin, Ronald, 23–24, 30, 79, 94, 104, 111, 113–114
on formal law, 94, 96
on formalized law and idealized law, 94–95
Hart and, 88
on judicial enterprise, 24, 25, 85, 105, 109
on law-like ideals, 108–109
on moral disagreement, 124–126
on principles and policies, 111–112
Rawls and, 119
Weber and, 115
equal freedom, 5
evenhandedness, 92
fear, 54–55, 72, 129, 160–161
biform, 165–166
of failure of argument, 120
of failure of legality, 120, 121
of free ideals, 121, 122, 131, 138
of open form, 121, 122, 142–143, 151
Fish, Stanley, 148
Fiss, Owen, 22–23, 31
formal law, 44, 45, 46, 49, 96, 97–98, 151
Dworkin on, 94, 96
law-like qualities of, 97
modern, 98–99
primitive, 94, 98–99

Index

rule of law and, 44–45, 102–103
Weber and, 44–45, 46, 96–97
Weber on primitive and modern, 98–99
formal rules, 95, 109
legal ideals fitting with, 109
formal structuring, 99–101, 115
formalization, 143, 167
failure of, 161
law-like language and, 156
formalized law, 78, 82–84, 85, 87, 120
coherence and, 85–86
development of, 85–86
idealized law common goals with, 85
frameworks, 136–137
conflicting, 148
frame-dependence, 138, 149, 157
free ideals, 121, 122, 131, 132, 138, 139–140
freedom
equal, 5
of individuals, 66–67
legality and, 69
minimal, 68
Gabel, Peter, 149
general communication, 146–147, 155
generality, 1, 47, 49, 100, 101, 115
German Civil Code, 97
Gilligan, Carol, 137
Hart, H. L. A., 18, 20–21, 22, 26, 79, 106, 144–145
on duality, 107–108
Dworkin and, 88
imagined primitive community by, 19
on legal systems, 19
on linguistic vagueness, 123–124
mistake by, 107–108
Rawls and, 92–93
on the rule of recognition, 20
on rules and ideals, 166–167
Hayek, Friedrich, 69
on rule of law, 81
Hercules, 113, 114
idealization, 115, 167
failure of, 121, 161
idealized law, 78, 82–83, 84, 85–86, 87, 94–95
coherence and, 85–86
formalized law common goals with, 85
impulse for, 120
impersonality, 1
individual freedom, 66–67
instituted discourse, 29, 32
affiliated argument and, 37
judges and, 55
of law-like law, 41
three zones of, 31–33
interpretive community, 22–23
irregularity, 72
irregular resolution, 152
judges, 18–19, 22–23, 27–28, 83, 140
affiliated argument and, 37
coevasive decisions by, 27
duty of, 36
law-makers, 76
nomological argument by, 55
norm-constituted position of, 36
responsibility of, 80
rule of recognition shared among, 22
self-restrained, 74
strictures binding, 38–39
judgment, 5, 14–15, 18–19, 21, 30–31, 46, 97–98,
136–137, 140, 141
anomic, 74, 75
arbitrariness and, 73–74, 75
textual judgment, 5
as expression of power, 72
justice and, 61
law-giving, 76
law-like legality and canons of, 30, 34, 37
nomothetic decision, 76
nonindividualized judgment, 112
pattern of like, 60
justice, 56, 61. See also legal justice
absence of, 72
formal, 44, 45–46, 48–49, 92, 102
under law, 2
law-like entitlement and, 38
liberty and political justice, 90
like cases decided alike, 4, 59–61
properties of, 60
Rawls on, 65
substantive, 44, 45–46
justifying theories, 133–114
Kennedy, Duncan, 127, 128–129
Knowledge and Politics (Unger), 127
language, 9. See also legal language; vagueness
classifications of language, arbitrariness of, 128
common, 9
liberty and, 156–157
modernism and, 157
law-like language, 156
law-like law, 2, 4, 41, 42, 51, 55, 58, 59–61, 96–98, 155
absence of, 74
governance of, 73
instituted discourse of, 41
instructive conception of, 78
law-like ideals, 108–109
liberty demanding, 53
modes of, 52
morality and, 85
other names for, 2
self-conception of, 40–41, 130, 154
synoptic view of, 115
law-like legality, 2, 3, 4, 6, 13–14, 52, 61, 63, 78–79,
80, 155
aspiration of, 9–10, 44, 53
canons of argument and, 34, 35
commitment to, 6, 54
formal interpretation of, 81
negative and positive conception of, 164
nomological legal practice, 33
practical interpretation of, 78
rule of law and, 91
lawyers, 28, 30–31
in courts, 36
litigants and, 18–19
legal disaster, 47
legal discourse, 30
legal scholars and, 38
legal enterprise, 24–25
Dworkin on, 24
ground rules of, 23–24
legal entitlement, 2, 4, 5, 62, 91, 111, 140, 164
absence of, 72
maxims of, 57
nomological legality and, 57–59
opposite of, 15
social life and, 57–58
standing laws and, 80, 103
legal ideals, 82, 83, 108, 111, 131–132
Dworkin on, 105, 109
formal rules fitting with, 109
formation of, 108
Hart on, 106–107
legal justice, 4, 15, 59–61, 164
requirements of, 63
legal language, 124, 143, 156, 157
legal practice, 2, 12, 18, 30, 31, 32, 41, 158
apprehensions of, 165
boundendedness of, 32
canons of, 33–34
controlled by nomological commitment, 15, 168
discourse of, 31, 34, 38
formative aspiration of, 165
liberal, 17, 40
plurality of aims of, 10
price of disengagement from, 38
self-conscious nature of, 39–40
Index

logic, 22
common reason, 58
MacIntyre, Alasdair, 136
Marx, Karl, 157
modernism, 157
language and, 157
legality and, 158
modernism/postmodernism (mpm), 128–129
modes, 55
of argument, 48, 50–51, 115, 119, 120
of law, 16, 59, 48, 78–79, 115
of law-like law, 52
morality, 3, 8, 9, 46, 48, 50, 83, 98, 103, 110, 125, 134, 144, 158
cautionary assumptions, 9
formal law and, 45
free moral inquiry, 134–135, 140
institutional, 125
law-like law and, 85
moral deliberation, 76
moral disagreement, 117–118, 121–122,
133–135, 137
assumption of, 138–139
exposure to, 139
peril, of law and, 124
outside law, 132, 158
rule-like law and, 81
skepticism, 127–128, 133, 135–136
of moral judgments, 156–157
of moral principles, 157
in social life, 125, 133–134
Nazi Germany, 46–47, 51
courts in, 47
moral precept in Nazi law, 47
Neumann, Franz, 46–48, 51, 69
on rule of law, 81
nomological commitment, 28, 41, 54, 55, 85, 128, 166
branching development of, 54–55
legal practice controlled by, 168
liberal practice and, 87
polity of, 72, 163–164
two specific projects arising from, 77
unfolding logic of, 42
nomological conception, 16, 56, 61–62, 64, 97
argument and, 34
discursive canons and, 34
law-like qualities required by, 56
pattern of, 165
nomological legality, 16, 27, 64, 76
legal entitlement and, 57–59
Index

modes of, 55
nomological practice, 33, 35, 39, 40, 41, 42, 62, 70, 155, 161
argument and, 51
central idea of, 53
self-conception of, 154–155
nomothetic decision, 76
nonformal law, 50–51
nonliberal motives, 10–11
open form, fear of, 121, 122, 142–143, 151
peril of law, 126–127, 160–161
moral disagreement and, 124
overcoming, 122–123, 130
policies, 3, 109, 110
Dworkin on, 111–112
invoking, 8
policy goals, 112
Political Liberalism (Rawls), 117, 119
power, 55, 73
judgment as expression of, 72
law-less, 152
legality as mediation of, 55
practical moral assessment, 98, 103
privacy, 110
public reason, 118
rational connection, 85–86
rational resolution, 1, 62–63, 122
rationality, 2, 14, 58–59, 153, 157. See also legal rationality
arbitrariness and, 3
formal law and, 97
nomological-connective, 158, 165
rational coherence, 98–99
rational connection, 63
Weber on, 97
Rawls, John, 60, 65, 90, 92, 102, 115–116, 118–119, 114
Dworkin and, 119
first view of law, 90–91, 117
Hart and, 92–93
mistake by, 102–103
Political Liberalism, 117, 119
on rule of law, 81, 91–92, 93
second view of law, 116–117
A Theory of Justice, 90, 92, 102, 106, 116, 119
reasonable care, 113
regularity, 1
coercive, 70–71
requirement of fit, 109–110

Roe v. Wade, 125–126
rule of law, 49, 50, 52, 116
formal justice and, 44–45, 92–93, 102–103
generality and, 47
Hayek on, 81
law-like legality and, 44, 91
Neumann on, 81
Rawls on, 81, 91–92
requirements of, 91, 92
Unger wrong about, 51
rule of recognition, 20, 21
shared among judges, 22
rule utilitarianism, 112
rules, 8, 20–21, 81. See also formal rules
Hart on, 106–107
morality and, 81
practical justification of, 83
rule of law and, 92–93
social rules, 19
system of, 93
self-government, 65
democratic, 159
self-justification, 16
skepticism, 126–127, 128, 157, 159–160
about abstraction, 148–149
liberal law and, 129–130
about liberalism, 137–138
linguistic, 127–128, 147–148
about meaning, 148
minimal, 159–160
moral, 127–128, 133, 135–137
omnibus, 128–129
about texts, 149
social life, 27–28, 32, 49–50, 57, 65
double institutionalization in, 28
legal entitlement and, 57–58
morality in, 125, 133–134
regime of law in, xi, 91
social rules, 19
standing laws, 79, 110–111
apprehending meaning of, 84, 91
argument in context of, 79
legal entitlement and, 80
social life and, 91
structure, 86, 101–102
formal structuring, 99–101, 115
pursuit of, 96
Weber on active structuring, 99
subjective values, 127–128
theocratic regimes, 46
A Theory of Justice (Rawls), 90, 92, 102, 106, 116, 119

unanswered questions, 167–168
on modernism, 137
wrong about rule of law, 51

vagueness
of language, 123–124, 126, 143, 144–146
peristence of, 147
legality and, 150

values, subjective, 127–128
vehicles in the park, 50, 124

Weber, Max, 45, 46, 89, 102, 137
on active structuring, 99
on coherence, 93
Dworkin and, 115
on formal law, primitive and modern, 44–45, 46, 96–97, 98–99
mistaken identification by, 51, 103–104
on rationality, 97